91-250

Case Number: _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MARGARET C. BLANK, ET AL.,

Petitioner,

vs.

BETHLEHEM STEEL CORPORATION, ET AL.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

John F. MacLennan
Counsel of Record for
Petitioner
KATTMAN, ESHELMAN &
MacLENNAN, P.A.
1920 San Marco Blvd.
Jacksonville, FL 32207
(904) 398-1229

QUESTION PRESENTED

May a retirement plan established and maintained pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* arbitrarily deny retirement benefits to certain participants while at the same time granting those same retirement benefits to similarly situated participants without violating ERISA?

CERTIFICATE OF INTERESTED PARTIES

I hereby certify that:

1. The judge below was the Honorable Howell W. Melton.

2. Plaintiffs below, petitioners in this Court, are Margaret C. Blank, Donald E. Alford, Jeanne Cornwell, John P. Cusick, John DeCarlo, Donald D. Downs, William D. Harrell, Walton W. Hood, Gary L. Lacher, Woodrow L. Lewis, Robert A. Perry, John M. Pfister, Robert C. Potter, Robert C. Schwienteck, Thomas E. Thompson, Kyle M. Tincher, Norman E. Williams and Richard C. Wolanin.

3. Counsel for plaintiffs below, petitioners in this Court, is John F. MacLennan, of Kattman, Eshelman & MacLennan, P.A.

4. Defendants below, respondents in this Court, are Bethlehem

Steel Corporation and Bethlehem 1985 Salaried Pension Plan, a foreign corporation.

5. Counsel for defendants below, respondents in this Court, are E. Lanny Russell, Smith, Hulsey & Busey and Richard J. Omato, Karr, Tuttle & Campbell.

Respectfully submitted,

John F. MacLennan

Kattman, Eshelman & MacLennan, P.A.
1920 San Marco Boulevard
Jacksonville, Florida 32207
(904) 398-1229
Attorneys for Petitioners

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CITES TO THE DISTRICT COURT AND COURT OF APPEALS

The opinion of the district court is found at 758 F.Supp. 697 (N.D. Fla. 1990).

The opinion of the Court of Appeals is found at 926 F.2d 1090 (11th Cir. 1989).

STATEMENT OF GROUNDS

ON WHICH JURISDICTION INVOKED

The final judgment by the District Court was entered on February 9, 1990. The decision of the Court of Appeals, Eleventh Circuit, denying Petitioners' request for rehearing was entered on May 13, 1991.

Petitioners are authorized to seek review of this matter by Rule 17, Rules of the United States Supreme Court and 28 U.S.C. Section 2101.

STATUTES AND REGULATIONS INVOLVED

The Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.

STATEMENT OF THE CASE AND THE FACTS

This action was brought by plaintiffs (hereafter referred to as "Blank") against defendants, Bethlehem Steel Corporation and the Bethlehem 1985 Salaried Pension Plan ("the Plan") alleging that Blank was denied certain retirement and other plant shutdown benefits in violation of the Plan and the requirements of ERISA. Summary judgment in favor of all defendants on all claims was entered on February 9, 1990. The petitioners timely appealed to the Court of Appeals Eleventh Circuit which affirmed the Trial Court and denied the petition for rehearing on May 13, 1991.

Appellants are former salaried employees of the Buffalo Tank Division of defendant Bethlehem Steel Corporation. In August 1986, the Buffalo Tank Division was sold to a separate legal entity,

Buffalo Tank Corporation. That corporation is not a party to this litigation. While all of the petitioners were initially offered employment with Buffalo Tank, Buffalo Tank has no legal obligation to continue that employment and had no obligation to do so from the date the sale was closed. At least one appellant, Mr. Robert Perry, has been laid off by Buffalo Tank. Bethlehem Steel did not retain any right to require Buffalo Tank's continued employment of petitioners. Bethlehem Steel no longer owns the assets sold to Buffalo Tank Corporation and can no longer operate or run the operation sold to Buffalo Tank Corporation. None of the petitioners were offered transfers to another position with Bethlehem Steel. As of the date of the sale to Buffalo Tank Corporation each petitioner had at least

twenty years of continuous service with Bethlehem Steel and had reached the age of fifty-five years. All plaintiffs met the age and service requirements to be eligible for Rule of 65 pension benefits.

All of the petitioners were participants in the Plan. The Plan provides for a retirement benefit known as Rule of 65 retirement. The relevant portions of paragraph 2.7 of the Plan document state:

> Any participant (i) who shall have had at least twenty years of continuous service as of his last day worked (ii who has not attained the age of 55 years, and (iii) whose combined age and years of continuous service shall equal 65 or more but less than 80, and
>
> (a) whose continuous service is broken by reason of a layoff or disability, or
>
> (b) whose continuous service is not broken and who is absent from work by reason of a layoff resulting from his election to be placed on layoff status as a result of a permanent shutdown

> of a plant, department or subdivision,...
>
> and who has not been offered suitable long-term employment as such employment is determined in accordance with rules and regulations adopted by the General Pension Board, shall be eligible to retire on or after January 1, 1986, and shall upon his retirement (hereinafter "rule of 65 retirement") be eligible for a pension;...

Appellants applied for these benefits. Their claims were denied and the appeals of their claims were denied. The Plan is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C., § 1001, et seq., and the present action is brought pursuant to 29 U.S.C. § 1132.

Section 5.3(c) of the Plan provides:

> "Service with another employer to which an employing company sells or transfers all of part of a plant, department, division, location, facility, subsidiary or other unit of such employing company may be credited as continuous service under this plan in accordance with and for such purposes as may be set forth in

> rules and regulations adopted by the general pension board with respect to each such sale or transfer."

Bethlehem Steel had sold off certain other divisions. In a sale of Bethlehem Steel assets to Broyhill and Associates, the sale was initially contemplated to be a sale as an ongoing operating entity with the employees situated similarly to Blank to be denied Rule of 65 and other plant shutdown benefits. However, because the employees represented by a collective bargaining agent rejected a proposal by the company, the sale was restructured so as not to constitute the sale as on ongoing entity and participants were then entitled to receive shutdown benefits.

In the sale by Bethlehem Steel of the Williamsport Wire Rope Division, as well as in the sale of "Panther Valley" assets, the purchase and sale

contract contained provisions demonstrating that the purchasing entity intended to continue the business of the division or other unit. With respect to the Panther Valley sale, one document produced by defendants stated:

> "Non-represented employees to be treated as a shutdown. However LCN expects to employ plus or minus eighty percent of current non-represented employees."

A press release with respect to this sale stated the purchasing corporation "expects to continue mining operations at Panther Valley."

Mr. Milton Bradshaw, an employee with the Wire Rope Division in Jacksonville, Florida, was hired by the purchasing entity upon the sale of that division and yet received Rule of 65 pension benefits from the Plan.

Mr. Michael Dopera, the administrator of the Plan, testified by

deposition as to the procedures utilized by the Plan and Bethlehem Steel in determining whether or not a sale of a division or other unit of Bethlehem Steel was to be considered a permanent plant shutdown for purposes of deciding eligibility for shutdown benefits pursuant to the Plan. Dopera testified that the Plan would be advised by Bethlehem Steel as to whether or not the sale was to be considered a permanent plant shutdown. No actual physical shutdown of the facility was required for such a finding by the Plan. Indeed, in the event Bethlehem declared the sale to be a permanent shutdown, the Plan simply accepted that finding and granted plant shutdown benefits including Rule of 65 pension benefits to all participants otherwise eligible. Whether or to what extent the employees of that division or

unit were offered employment by the purchasing entity was not looked into, discussed or considered by the Plan.

Dopera testified that once the company declares that a sale is to be treated as a shutdown, the employees otherwise eligible would be granted shutdown benefits including Rule of 65 pension benefits. And this is true even if the operation was closed for only one day and all of the employees were re-employed by the purchasing company. Dopera stated that the Plan looks at whether or not the purchasing company is hiring most or all of the employees and providing comparable benefits. The decision of whether the sale is or is not a shutdown is made by the company. As to how Bethlehem Steel determines whether or not a sale is a permanent shutdown or not, that is part of the business process

that he, as the administrator of the Plan, is not involved with. He is unaware of any written definition of the term "permanent shutdown." Whether or not it is a permanent shutdown as far as the Plan is concerned is determined by Bethlehem Steel stating whether or not it is to be treated as a permanent shutdown.

BASIS FOR FEDERAL JURISDICTION

Blank's suit invoked federal jurisdiction pursuant to the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq.

ARGUMENT

THIS COURT SHOULD DETERMINE WHETHER IN AN ACTION CHALLENGING DENIAL OF PENSION BENEFITS PURSUANT TO ERISA BENEFITS ARE PROPERLY DENIED TO PARTICIPANTS WHO WERE EMPLOYED BY A DIVISION WHICH WAS SOLD OFF BY THE PLAN SPONSOR WHERE OTHER EMPLOYEES EMPLOYED BY OTHER DIVISIONS SOLD OFF BY THE PLAN SPONSOR RECEIVED THOSE PENSION BENEFITS.

Blank sought "Rule of 65" plant shutdown benefits from the Plan. Blank and the other petitioners met all of the requirements for those benefits except that the benefits were denied on the basis that there was no "permanent shutdown" because the division for which Blank worked was sold off to a purchasing entity which continued to operate the division. However, under similar situations, the Plan had granted Rule of

65 benefits even where the division for which the employees worked was also sold off, continued to operate, and employed the employees. The Court of Appeals decision affirming this inconsistent treatment is directly in conflict with other Courts of Appeal which have clearly held that treating similarly situated plan participants differently constitutes an arbitrary and capricious action. Jung v. FMC Corp., 755 F.2d 708, 713 (9th Cir. 1985); Blau v. Del Monte Corp., 748 F.2d 1348, 1354 (9th Cir. 1984).

Precisely how arbitrary and capricious was Bethlehem's actions with respect to Blank can be demonstrated by review of the deposition testimony of a representative of the Plan. When asked how it was determined whether or not there had been a "permanent plant shutdown" so as to determine if Rule of

65 pension benefits would paid out, that witness responded that Bethlehem Steel would advise the Plan as to whether a facility was being "permanently shut down." In the event the Plan was so advised by Bethlehem Steel, those employees who met the other requirements for shutdown benefits were granted such benefits. The Plan would not investigate further to determine if the division or plant being sold was actually, in fact, shut down or whether it was then operated as a going concern by the purchasing entity. Further, in those cases where Bethlehem Steel advised the Plan the sale was being treated as a permanent shutdown, the Plan did not investigate to determine if those employees who worked for the sold-off division were offered or accepted employment with the purchasing corporation.

Evidence demonstrated conclusively that in at least one case, a purchase and sale of certain Bethlehem Steel assets was originally contemplated between the parties as a sale of an ongoing entity so that salaried employees would be denied plant shutdown benefits. However, because the employees represented by a collective bargaining agent rejected a proposal by the company, the sale was restructured so as not to constitute a sale as an ongoing entity which then entitled Plan participants to shutdown benefits.

In at least one other transaction Bethlehem Steel chose to treat the transaction as a permanent shutdown, thus entitling employees to shutdown benefits even though the purchasing entity expected to employ

approximately 80 percent of the salaried employees.

One of the purposes of ERISA's requirement that pension plans be set forth in written plan documents and summary plan descriptions is so that participants such as Blank can have a meaningful understanding as to their benefit based upon a review of the Plan documents. However, nothing in a review of the Plan document would have allowed Blank to determine that in the event her employment with Bethlehem Steel was terminated through a sale of her division, she would not be entitled to permanent shutdown benefits even where employees in precisely the same situation were granted shutdown benefits by virtue of Bethlehem Steel designation that the transaction was to be treated as a permanent shutdown.

It is clear that the Plan did not require any actual physical shutdown of a facility in order that employees qualify for permanent shutdown benefits. Neither did the Plan investigate behind Bethlehem Steel's declaration that a sale transaction was to be treated as a permanent shutdown. In that regard the actions of Defendants bring to mind the words of Humpty Dumpty in Lewis Carroll's Through the Looking Glass, chapter 6:

> "When I use a word" Humpty Dumpty said in a rather scornful tone, "it means just what I choose it mean--neither more nor less."

While defendants argued and the Court's accepted a distinction based upon the fact that job offers were made to Blank by the fledgling stranger purchasing corporation, such job offers cannot constitute a meaningful distinction where it is clear there was no ongoing job security or benefit

security as a result of that of that employment. Thus, Blank finds herself in precisely the same situation as those employees in the other transactions described above who also received employment from the purchasing entity except that where those employees received plan shutdown retirement and other benefits, Blank did not.

In the instant action, it appears that had an agreement not been reached between the employees represented by a labor organization and the purchasing corporation, then the sale of the Buffalo Tank Division to Buffalo Tank Corporation would have been considered to be a plant shutdown and Blank and the other salaried employees would have been eligible to receive and would have received Rule of 65 benefits. In essence what the defendants in this action have

done is to add another condition to the eligibility requirements of the Plan document itself. That condition being that plant shutdown benefits will only be paid in the case of the sale of a division where the purchasing entity cannot come to terms with the labor organization representing hourly employees. Clearly under ERISA, adding an additional eligibility consideration not found in the Plan is prohibited even under the arbitrary and capricious standard. The Eleventh Circuit has previously stated:

> "The imposition of a standard that is not contained in the terms of a plan amounts to an arbitrary and capricious decision." Harris v. Pullman Standard, 809 F.2d 1495 (11th Cir. 1987).

The Court's attention is also invited to the well-reasoned decision of the district court in Varhola v. Doe, 657 F.Supp. 595 (S.D. Ohio 1986) affirmed in

part and remanded 820 F.2d 809 (6th Cir. 1987). There, the district court dealt with the sale of a coke plant. The plaintiff-employees sought a determination that a plant shutdown had occurred and that they were entitled to benefits under the former employer's pension plan. The district court granted summary judgment in favor of the employees, holding they were entitled to receive shutdown pension benefits. The appeals court affirmed in part and remanded holding that the district court had failed to apply the arbitrary and capricious standard properly.

The plaintiffs in Varhola were salaried employees of Cyclops Corporation and worked at a coke facility in Portsmouth, Ohio. Cyclops determined to shut down certain of the facilities in Portsmouth, but continued operating the

coke plant. In November, Cyclops sold the coke plant assets. However, plaintiffs employment was not interrupted and all of the plaintiffs were subsequently employed by the purchasing corporation. Cyclops pension plan provided for Rule of 65 provisions similar to the Bethlehem plan. Cyclops contended that plaintiffs were not entitled to Rule of 65 benefits because their continuous service had not been broken by a permanent shutdown of a division, plant, office or department. Plaintiffs were advised that if they refused to work for the purchasing corporation, they would not receive shutdown pensions and would be eligible only for deferred vested pensions upon reaching normal retirement age. Each of the plaintiffs went to work for the purchaser.

The district court granted plaintiff's motion for summary judgment noting that undisputed facts demonstrated that plaintiffs had met the age and years of service requirements. The court held that by the sale of the coke works to a corporation which was not a successor corporation as defined under the terms of the plan (as Buffalo Tank is also not a successor under the terms of the Plan herein), Cyclops permanently shut down the coke works as contemplated by the Plan.

The Court stated:

> "Here, there was a permanent shutdown of the coke works by Cyclops. Cyclops, from its point of view, permanently shut down the coke plant by selling the plant. Cyclops no longer owns the plant, and therefore it can no longer operate or run the plant. Additionally, plaintiffs were not offered a transfer to another location within Cyclops. Finally, no attempt was made to secure the voluntary agreement of the plaintiffs to transfer to the stranger company.

> Rather, they were forced to transfer or face economic disaster. The plan paragraphs in issue only involve the relationship of Cyclops to its salaried employees, and when Cyclops permanently shut down its facility, the clauses protected the plaintiffs."

The facts herein are in all material respects identical to the facts in Varhola. None of the employees were offered a transfer to another Bethlehem Steel Corporation location. No attempt was made to secure the voluntary agreement of the plaintiffs to the transfer to the new company.

Thus, the Court of Appeals' decision affirming the denial of benefits to Blank is contrary not only to those cases which hold that inconsistent treatment of similarly situated participants is impermissible, but is also contrary to this Court's interpretation as to what constitutes a

plan shutdown for shutdown benefit purposes.

CONCLUSION

In this era of corporate restructurings and leveraged buy-outs, the issues presented by this petition are particularly ripe for review and decision by this court. The ruling of the Court of Appeals if left standing grants to ERISA plans unbridled arbitrary discretion to grant and deny benefits in these purchase and sale transactions without regard to the language of the plans themselves. The approval of this unbridled discretion constitutes a serious undercutting of the primary purposes of ERISA.

For all the reasons set forth in this petition, Blank respectfully urges this court to grant the petition and consider the issues raised by the petition on the merits.

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused three copies of the foregoing Petition for Writ of Certiorari to be served on each counsel for respondent, by first-class mail, postage prepared as follows:

Richard J. Omato, Esquire
Karr, Tuttle & Campbell
1201 Third Avenue, Suite 2900
Seattle, Washington 98101-3028

E. Lanny Russell, Esquire
Smith, Hulsey & Busey
1800 First Union Bank Tower
Jacksonville, Florida 32202

Dated this 9th day of August, 1991.

Kattman, Eshelman & MacLennan, P.A.
1920 San Marco Boulevard
Jacksonville, Florida 32207
(904) 398-1229

By: _____
John F. MacLennan
Counsel for Petitioner

APPENDIX

APPENDIX

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Margaret C. BLANK et al.,
Plaintiffs-Appellants,

v.

BETHLEHEM STEEL CORPORATION,
PENSION PLAN OF BETHLEHEM STEEL
CORPORATION AND SUBSIDIARY COMPANIES,
Defendants-Appellees

No. 90-3167.

United States Court of Appeals,
Eleventh Circuit.

March 19, 1991.

Plaintiffs, a group of former salaried employees of Bethlehem Steel Corporation ("Bethlehem"), sued Bethlehem and its pension plan when they were denied retirement benefits upon the sale of Bethlehem's Buffalo Tank Division. They claimed that the denial to them of a contingent benefit, entitled the rule-of-65 benefit, violated the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1145, which governs this employee benefit plan. On summary

judgment, the district court found that the benefits at issue were not accrued within the meaning of ERISA, and that the statute therefore did not proscribe the elimination of those benefits. *See* 29 U.S.C. § 1054(g). The court also determined that it should apply an arbitrary and capricious standard of review to the General Pension Board's interpretation of the plan.[1] Applying that standard, the district court found no violation in the Board's determination that plaintiff did not qualify for rule-of-65 benefits. We affirm.

I.

In August 1986, Bethlehem sold its Buffalo Tank Division to an independent corporation called the

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[1] Section 8 of the Bethlehem 1985 Salaried Pension Plan sets forth the composition of the General Pension Board and assigns to it authority for administration of the plan.

Buffalo Tank Corporation. At the time of the sale, the division employed 300 people, including the plaintiffs at a number of facilities nationwide. The transaction was structured as a sale of an ongoing business. Under section 8.01 of the purchase and sale agreement, Buffalo Tank Corporation agreed to offer employment to all employees who were at work on the date of the sale, and to call back laid off Bethlehem workers in the event it was necessary to expand the workforce. It also agreed to pay substantially the same wages and benefits as Bethlehem had paid, and to honor years of service with Bethlehem for most purposes in the new corporation. In addition, Bethlehem agreed to honor service with the purchaser for purposes of accruing benefits under the Bethlehem pension plans.

Plaintiffs brought suit when they applied for and were denied a benefit called the "rule-of-65" retirement benefit. In relevant part, the Bethlehem pension plan provides:

> Any participant (i) who shall have had at least twenty years of continuous service as of his last day worked, (ii) who has not attained the age of 55 years, and (iii) whose combined age and years of continuous service shall equal 65 or more but less than 80, and
>
> (a) whose continuous service is broken by reason of a layoff or disability, or
>
> (b) whose continuous service is not broken and who is absent from work by reason of a layoff resulting from his election to be placed on layoff status as a result of a permanent shutdown of a plant, department or subdivision thereof,
>
> . . . . .
>
> and has not been offered suitable long-term employment as such employment is determined in accordance with rules and regulations adopted by the General Pension Board, shall be eligible to retire on

> or after January 1, 1986, and shall upon his retirement (hereinafter "rule-of-65 retirement") be eligible for a pension;....

Bethlehem 1985 Salaried Pension Plan § 2.7.

On the date of the sale, all of the plaintiffs met the age and service requirements of the rule-of-65 provision. The plan administrator nevertheless determined that they were not eligible for the benefit, based on rules adopted by the General Pension Board. Under the Board's rules, the sale was not deemed a permanent shutdown under § 2.7(b) of the plan and plaintiffs were granted continuous service for their work at Buffalo Tank, making them ineligible for the benefit under § 2.7(a).

In their suit, plaintiffs claimed that they were improperly denied rule-of-65 benefits under two theories.

First, they claimed that the benefits at issue were accrued within the meaning of ERISA and that the plan could not lawfully reduce those benefits. Second, they claimed that the administrator erroneously concluded that they failed to meet the requirements of § 2.7, and argued that they are entitled to benefits under one or the other of two subsections. They claimed eligibility under subsection (a) because their continuous service was broken and they were laid off when they ceased to be employed at Bethlehem. Alternatively, they argued that the sale of the division constituted a shutdown within the meaning of subsection (b). Plaintiffs further argued that the Board's decision against benefits should be reviewed *de novo* rather than under the arbitrary and capricious standard.

The defendants moved for summary judgment. The court granted the motion, finding that the benefit was not accrued within the meaning of ERISA, that the arbitrary and capricious standard of review applied, and that the General Pension Board's determination that plaintiffs were not entitled to benefits was not arbitrary and capricious. On appeal, plaintiffs challenge each of these rulings.

II.

The district court correctly applied the relevant law in determining whether the rule-of-65 is an accrued benefit under ERISA and what standard of review should be applied to the decisions of the plan administrator. We adopt its reasoning and limit our discussion to the issue of whether the plan administrator's

decision to deny rule-of-65 benefits was arbitrary and capricious.

III.

In applying the arbitrary and capricious standard to a plan administrator's decision, the district court's role is limited to determining whether the contested interpretation was made rationally and in good faith. Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37, 39 (11th Cir.1989); Anderson v. Ciba-Geigy Corp., 759 F.2d 1518, 1522 (11th Cir.1985). Factors taken into account include the uniformity of the Board's construction, the reasonableness of its interpretation and possible concerns with the way unexpected costs may affect the future financial health of the plan. Guy, 877 F.2d at 39. Other evidence of good faith may be found in "(1) internal consistency of a plan

under the interpretation given by the administrators or trustees; (2) any relevant regulations formulated by the appropriate administrative agencies...; and (3) factual background of the determination by a plan and inferences of lack of good faith, if any." Anderson, 759 F.2d at 1522.

We will uphold the district court's grant of summary judgment for Bethlehem only if no material issues of act were in dispute. Fed.R.Civ.P. 56(e); Celotex Corp. v. Catrett 477 U.S. 317, 323, 106 S.Ct. 2528, 2552-53, 91 L.Ed.2d 265 (1986). Plaintiffs were entitled to all reasonable inferences, *See* Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir.1989), but the issue was appropriate for summary judgment "unless there [wa]s sufficient evidence favoring the nonmoving party for a [trier of fact] to

return a verdict for that party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

A. *Break in Continuous Service.*

Plaintiffs first contend that their continuous service was broken and that they were laid off within the meaning of the rule-of-65 benefit because the transfer of the division to a new corporation amounted to a layoff by Bethlehem. *See* Bethlehem Plan, § 2.7(a). They base this argument exclusively on two cases, Conner v. Phoenix Steel Corp., 249 A.2d 866 (Del.1969), and a decision of the appeals board of the Pension Benefit Guaranty Corporation, Appeal of James Glenn, No. 84-187 (Dec. 30, 1985). These decisions reviewed plan provisions similar to the rule-of-65 benefit at issue here. Both cases involved the

termination without cause of an individual employee. In each case, the reviewing body held that such a termination amounted to a break in continuous service caused by a layoff. From this, the court and board both concluded that the participants were entitled to the benefits they sought.

We do not see how these decisions help plaintiffs in this case. First, plaintiffs do not indicate how a decision holding that an individual's discharge without cause amounts to a break in continuous service sheds light on whether the sale of a division break breaks the continuous service of the division's employees. Second, as we already have held, the plan involved here commits the interpretation of the terms of the plan to the Board, subject only to arbitrary and capricious review. In

neither Conner nor Glenn was such deference applied. Third, other courts have held that an employee who continues employment with a purchasing corporation has not experienced a layoff by the original employer. *See* Rowe v. Allied Chemical Hourly Employees' Pension Plan, 915 F.2d 266, 269 (6th Cir.1990). *Cf.* Sejman v. Warner-Lambert Co., Inc., 889 F.2d 1346, 1350 (4th Cir.1989) (sale is not a termination for purposes of severance benefits); Lakey v. Remington Arms Co. 874 F.2d 541, 544-45 (8th Cir.1989) (same). Finally, to the extent we understand plaintiffs' argument, they suggest that the fact that Bethlehem no longer employs them *per se* breaks their continuous service under the plan. But the Bethlehem plan specifically provides that after some sales of divisions employees may be credited with continuous

service in accordance with rules and regulations adopted by the General Pension Board. *See* Bethlehem Plan, section 5.3(c).[2] Thus, the plan explicitly contemplates that some transfers of divisions will not trigger a break in service necessary for rule-of-65 benefits. Plaintiffs have offered no evidence suggesting that the administrator's decision to credit service with Buffalo Tank Corporation as

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[2] Section 5.3(c) provides:

> (c) Service with another employer to which an Employing Company sells or transfers all or part of a plant, department, division, location, facility, subsidiary or other unit of such Employing Company *may be credited as continuous service* under this Plan in accordance with and for such purposes as may be set forth in rules and regulations adopted by the General Pension Board with respect to each such sale or transfer.

(Emphasis added.)

continuous service was arbitrary and capricious, and the decision is on its face patently reasonable.

B. *Meaning of "Shutdown"*

Plaintiffs' principal argument is that the Board's determination that the sale did not constitute a shutdown was arbitrary and capricious. The thrust of plaintiffs' argument is that the Board, without any basis, treated differently sales that were indistinguishable from this one.[3] They point specifically to the sales of Bethlehem facilities to Broyhill & Associates, Lehigh Coal and Navigation and Williamsport Wirerope.[4] Although

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[3] We note that there is no dispute that all employees involved in the Buffalo Tank sale were treated the same.

[4] We assume without deciding that two of these sales, which occurred after the transaction at issue here, nevertheless are relevant to whether the Board acted arbitrarily at the time it

each of these sales was called a shutdown, plaintiffs presented facts suggesting that at least some and perhaps many of the salaried employees involved in the sales were employed by the purchasing corporation. Those employees nevertheless were allowed to collect rule-of-65 benefits. This, plaintiffs assert, creates a material factual dispute that suggests that the Board's determination that the instant sale was not a shutdown was arbitrary.

The stipulated facts reveal, however, that there were very real differences in these sales. The parties agreed that in every Bethlehem sale that

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denied benefits to the plaintiffs. *But see* Brown v. Blue Cross & Blue Shield of Alabama, 898 F.2d 1556, 1559 (11th Cir.1990) (in determining if administrator's decision was arbitrary and capricious, court must determine whether there was a reasonable basis for the decision based on facts known at the time of the decision).

was conducted as a sale of an ongoing business, the purchaser agreed that it would offer employment to all Bethlehem employees in substantially the same positions in which they had been employed and for substantially the same rate of pay and benefits. In addition, for most purposes, employees would be entitled to credit with the purchasing employer for service time with Bethlehem. Moreover, employees working for the purchasing corporation would continue to be credited with service for vesting and eligibility purposes for certain benefits under the Bethlehem plan. In contrast, the parties stipulated that in none of the sales pointed to by plaintiffs and called shutdowns did the purchasing company promise to offer employment to Bethlehem employees or promise substantially similar wages and benefits to them.

As the district court found, this stipulated difference is ample basis for finding the Board's decision not arbitrary. The presence of discrete similarities between particular sales does not convert the Board's decision to treat the sales differently into an arbitrary one *per se* unless there was no reasonable basis for the administrator to call the other sales shutdowns while not calling this sale a shutdown. The fact that some salaried employees from those other sales were employed by the purchasing corporation does not create a material factual dispute about the nature of each sale as a whole.

The plan admits that it has not closely examined sales that Bethlehem has declared to be shutdowns, choosing instead to examine closely only those decisions in which Bethlehem has made a

declaration that is detrimental to plan participants. This procedure is somewhat troubling because it would appear that the plan administrator is in no position accurately to determine whether sales differ if it examines only the specifics of one type of sale. Nevertheless, despite the fact that the plan administrators are placing themselves at some risk should Bethlehem choose arbitrarily to benefit a particular group of employees by calling a sale of a shutdown where the terms of that sale are indistinguishable from others they have decided were no shutdowns, no such arbitrariness has been shown here. The plan apparently operated on the assumption that Bethlehem would not choose to impose substantial benefit obligations upon itself where it had negotiated substantial employee

protections into its sale terms. The stipulated facts show that, in all of the sales pointed to by plaintiffs, that assumption was not faulty. There is, therefore, no factual basis to support a finding that the administrator's procedures have resulted in arbitrary treatment of similarly situated employees.

Plaintiffs' argument both below and to this court was not that a sale such as this can reasonably be understood only to be a shutdown. They make no general argument about the unreasonableness of the administrator's interpretation. In fact, at oral argument, they observed that they ordinarily would envision a shutdown to encompass only the complete abandonment of a facility. Plaintiffs nevertheless rely on Varhola v. Cyclops Corp., 657

S.Supp. 595 (S.D. Ohio 1986), in which the court reasoned that since the original owner of a facility no longer operated the plant after its sale, the facility was shut down *vis a vis* the original corporation. *Id.* at 597. This decision, however, was remanded by the Sixth Circuit in Varhola v. Doe, 820 F.2d 809 (6th Cir.1987), for review under the arbitrary and capricious standard. 820 F.2d at 813-14. On remand, the district court held that the administrator's determination that the sale of an operation as an ongoing concern did not constitute a shutdown was not arbitrary and capricious, and this determination was not further appealed. *See* Varhola v. Cyclops Corp., 914 F.2d 259 (6th Cir.1990). Thus, the original district court opinion in Varhola does not continue to support a general conclusion

that the sale of an operation must be considered a shutdown as to the original employer.

Moreover, it seems entirely reasonable for the plan administrator to conclude that where the negotiated terms of the sale included contractual promises from the purchaser to employ Bethlehem employees in substantially the same positions and on the same terms, including benefits, the sale should not be considered a shutdown entitling plaintiffs to rule-of-65 benefits as well. This reading is consistent with the decisions of courts upholding determinations that sales of operations do not constitute terminations triggering severance benefits. *See, e.g.*, Sejman, 889 F.2d at 1350; Lakey, 874 F.2d at 544-45.

Finally, plaintiffs do not contend that the Board's construction of the terms "shutdown" was internally inconsistent nor do they offer any evidence of bad faith. *See* Anderson, 759 F.2d at 1222 (internal consistency and evidence of bad faith are factors in determining whether decision is arbitrary and capricious). Instead, they admit that the meaning of the term is not obvious from the plan document and stipulate to facts suggesting that the Board reviews precisely those situations in which Bethlehem's description of a sale has adverse consequences for plan participants.

We therefore conclude that the district court did not err in holding the plaintiffs failed to offer sufficient material facts from which a factfinder

could determine the Board's decision to be arbitrary and capricious.

AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

MARGARET C. BLANK, et al.,

Plaintiffs.

vs Case No. 88-867-Civ-J-12

BETHLEHEM STEEL CORPORATION, and BETHLEHEM 1985 SALARIED PENSION PLAN,a foreign corporation,

Defendants.

ORDER GRANTING SUMMARY JUDGMENT

This cause is before the Court on defendants' Motion for Summary Judgment and/or Dismissal, filed herein on September 5, 1989. Defendants submitted a reply memorandum, filed herein on October 26, 1989. The Court will grant defendants' motion.[1]

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[1] Defendants also moved to strike portions of plaintiffs' memorandum on the ground that unsupported factual statements were contained therein, said motion filed herein on October 10, 1989. Plaintiffs responded to the motion to strike with a memorandum containing

This action involves the denial of plaintiffs' claims for retirement benefits under the terms of the Bethlehem 1985 Salaried Pension Plan ("the Plan"). Plaintiffs are former salaried employees of defendant Bethlehem Steel Corporation ("Bethlehem Steel") in its Buffalo Tank Division. As such, they were participants in the Plan. On August 26, 1986, Bethlehem Steel consummated the sale of its Buffalo Tank Division to Buffalo Tank Corporation. On that date, the parties agree, each plaintiff had at

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verification of some factual assertions, filed herein on October 27, 1989. At the pretrial conference held October 19, 1989, the Court indicated that it would deny the formality of defendants' motion while respecting the substance thereof. That is, the Court will not engage in the exercise of striking any portion of plaintiffs' memorandum, but to the extent that a purported disputed issue of material fact asserted therein lacks the kind of evidentiary support appropriate to the opposition of a motion for summary judgment the Court will not consider that fact in its ruling.

least twenty years of continuous service with Bethlehem Steel and had not reached the age of fifty-five years. None of the plaintiffs were offered transfers to another position with Bethlehem Steel. All went to work for Buffalo Tank Corporation, although one plaintiff, Robert Perry, has since been laid off by the successor corporation.

The Plan provides for a retirement benefit known as Rule-of-65 Retirement. The relevant portions of paragraph 2.7 state:

> Any participant (i) who shall have had at least 20 years of continuous service as of his last day worked, (ii) who has not attained the age of 55 years, and (iii) whose combined age and years of continuous service shall equal 65 or more but less than 80, and
>
> (a) whose continuous service is broken by reason of a layoff or disability, or
>
> (b) whose continuous service is not broken and who is absent -

> from work by reason of a layoff resulting from his election to be placed on layoff status as a result of a permanent shutdown of a plant, department or subdivision thereof,...
>
> and has not been offered suitable long-term employment as such employment is determined in accordance with rules and regulations adopted by the General Pension Board, shall be eligible to retire on or after January 1, 1986, and shall upon his retirement (hereinafter "rule-of-65 retirement") be eligible for a pension;....

Plaintiffs applied for these benefits. Their claims were denied and the appeals of their claims were denied. The Plan is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001, et. seq., and the present action is brought pursuant to 29 U.S.C. § 1132.

Plaintiffs have two theories under which they are entitled to relief. Under one theory, the Rule-of-65

Retirement benefits are accrued benefits that the Plan cannot lawfully reduce. Under the other theory, the benefits are not accrued, but the action of the Plan's General Pension Board in denying benefits is, depending on the standard of review, either wrong as a de novo matter, or arbitrary and capricious.

Defendants move for summary judgment on the grounds that Rule-of-65 Retirement is an unaccrued benefit that the Board may lawfully eliminate. Defendants argue that the decision to make Rule-of-65 Retirement unavailable to plaintiffs was the exercise of discretion by the General Pension Board. This exercise of discretion, defendants urge, is reviewed by the arbitrary and capricious standard and it passes muster under that standard.

Whether Rule-of-65 Retirement benefits are accrued benefits or not is a question of law decided by the Court through construction of the relevant documents. See Roper v. Pullman Standard, 859 F.2d 1472, 1473-74 (11th Cir. 1988). Whether the standard of review in this Court is the de novo standard or the arbitrary and capricious standard also is a question of law. See Baker v. Big Star Div., No. 88-8787, ____ F.2d _____, slip op. at 1434-36 (11th Cir. 1989).[2] Whether the General Pension Board acted in an arbitrary and capricious manner is a question of law that rests on factual findings. See Jett v. Blue Cross & Blue Shield of Ala., 890

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[2] The Baker decision originally was issued November 30, 1989, and published at 888 F.2d 1557. The opinion was amended January 29, 1990, and the original opinion was withdrawn to be published as amended. The Court's citation is to the amended opinion.

F.2d 1137, 1140-41 (11th Cir. 1989) (Johnson, J., concurring and dissenting).

The first two issues, then, are readily resolvable on summary judgment. The final issue also is susceptible to summary judgment in this case because the material issues of fact are not in dispute. The Court, of course, gives plaintiffs the benefit of every reasonable inference to be drawn from the evidence. See Spence v. Zimmerman, 873 F.2d 256, 257 (11th Cir. 1989). In the usual instance, "[t]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a [trier of fact] to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986)

(citations omitted). Because the conclusion concerning the arbitrary and capricious standard is committed to the Court and the record does not suggest factual issues that turn on credibility questions or reveal conflicts that are resolvable only through trial testimony, summary judgment is an appropriate vehicle to resolve the issue.

ACCRUED OR UNACCRUED BENEFIT

The Plan, as reflected in the previously quoted portion, confers Rule-of-65 Retirement benefits in two relevant instances. Under paragraph 2.07(a), a break in continuous service occasioned by a layoff triggers the benefit for an employee who otherwise qualifies as to age and service. Under paragraph 2.07(b), no break in continuous service is necessary, but the otherwise eligible employee must have elected to be placed

on layoff status following the permanent shutdown of a plant. Additionally, in order to complete the eligibility requirements of Rule-of-65 benefits, an employee who reaches the requisite age and service combination must not have been offered suitable long-term employment.

Defendants urge that they did not violate ERISA by eliminating Rule-of-65 Retirement benefits because those benefits were not accrued and therefore subject to discontinuation. Plaintiffs maintain that the benefits are accrued. This distinction is central because "the fiduciary provisions of ERISA are not implicated in the sale of a business merely because the terms of sale will affect contingent and non-vested future retirement benefits." Phillips v. Amoco Oil Co., 799 F.2d 1464, 1471 (11th Cir.

denied, 481 U.S. 1016 (1987).

ERISA imposes no obligation to pay benefits before an employee reaches normal retirement age. Fine v. Semet, 699 F.2d 1091, 1093 (11th Cir. 1983). "The accrued benefits secured by ERISA do not encompass unfunded, contingent early retirement benefits or severance benefits." Sutton v. Weirton Steel Div., 724 F.2d 406, 410 (4th Cir. 1983), cert. denied, 467 U.S. 1205 (1984); see Blessitt v. Retirement Plan for Employees of Dixie Engine Co., 848 F.2d 1164, 1173 .21 (11th Cir. 1988) (en banc) ("The rerequisites for entitlement to early etirement benefits and normal pension nefits are discreet and stinguishable."); Phillips, 799 F.2d at 1 (fiduciary duty not breached by mination of contingent and non-vested

future retirement benefits, citing Sutton with approval). The contingent nature of the Rule-of-65 Retirement benefits is plain from the condition that eligibility be preceded by plant shutdown, layoff or disability. Cf. Roper, 859 F.2d at 1473-74. Termination of the benefits, then, does not violate the ERISA prohibition against the termination of accrued benefits.[3] Cf. Hlinka v. Bethlehem

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[3] The Court also has considered the application of 29 U.S.C. § 1054(g), a provision enacted by Congress in 1984 to protect accrued early retirement benefits. The result is unchanged. See Ross v. Pension Plan for Hourly Employees of SKF Indus., 847 F.2d 329, 332-34 (6th Cir. 1988) (plant shutdown benefits not within protection of § 1054(g), cited with approval in Roper, 859 F.2d at 1474.

Defendants argue the provision does not apply because the amendment to the Plan to authorize reductions was enacted before the effective date specified in the Retirement Equity Act of 1984. The Court is of the opinion that the new provision is the controlling law to consider. Although it applies to amendments adopted after July 30, 1984 and the amendment in this case purportedly took place during 1983, two

Steel Corp., 863 F.2d 279, 283-85 (3d Cir. 1988) (interpreting the Plan under consideration here and holding that 70/80 retirement benefit is not an accrued benefit).

Plaintiffs have urged the authority of Amato v. Western Union International, Inc., 773 F.2d 1402 (2d Cir. 1985), cert. dismissed, 474 U.S. 1113 (1986), in support of their assertion that the Rule-of-65 Retirement benefits are accrued. That case,

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other facts suggest the applicability of the provision. First, the Plan is titled "Bethlehem 1985 Salaried Pension Plan," placing it in the relevant time period. Second, and more importantly, the plan amendment adopted in 1983 did not cause the decrease of benefits of which plaintiffs complain; rather, the 1983 amendment authorized the General Pension Board to adopt rules and regulations in 1986. The 1983 amendment was void of content until implemented in 1986, a situation which should be treated as if the amendment occurred at the later date. As noted above, however, the result is not affected by the application of 29 U.S.C. § 1054(g).

however, does not address the issue present in this case. The issue in Amato was stated as "whether an employer may terminate a plan's unreduced, funded early retirement benefits that are not contingent on an external event." Id. at 1413 (emphasis added). The caveat in this statement, intended by the court to distinguish its case from Sutton, likewise distinguishes Amato from this case.[4] See also Ashenbaugh v. Crucible

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[4] Plaintiffs additionally submit a pre-ERISA state court decision, Connor v. Phoenix Steel Corp., 249 A.2d 866 (Del. 1969), and a decision by the Appeals Board of the Pension Benefit Guaranty Corporation ("PBGC"), Appeal of James Glenn, No. 84-187 (Dec. 30, 1985). Plaintiffs argue that Connor, interpreting a pension plan identical in many ways to the language in the Rule-of-65 Retirement benefit at issue here, held that interpretation of the term "layoff" compels the conclusion that continuous service was broken here. PBGC relied on Connor in its Glenn decision, an appeal decided under a plan by the same employer and using identical language as the one in Conner.

Conner does not apply in this case for several reasons. First, ERISA superceded the older line of state court cases, such as Connor, that held severance benefits ripen into a contract due on the sale of a business. See Jung v. FMC Corp., 755 F.2d 708, 714 (9th Cir. 1985); see Also Simmons v. Diamond Shamrock Corp., 844 F.2d 517, 520 (8th Cir. 1988) (prior state court decision interpreting plan does not affect review under ERISA). Second, the plan in Connor did not confer discretion on a body, such as the General Pension Board, to construe the eligibility through the promulgation of rules and regulations. Third, the central premise in Connor is that the court must construe an ambiguity in terms of the plan, see 249 A.2d at 868; this premise has no place "[i]f the plan . . . give[s] the employer or administrator discretionary or final authority to construe uncertain terms," see Firestone, 109 S.Ct. at 955 (construing, among others, Connor). Last, Connor resolves the claim of a single employee who was discharged without cause. It does not address the sale of a business as an ongoing concern with the carryover of the workforce at substantially the same rate of pay and benefits.

Glenn seemingly has greater application because it was decided under ERISA. This facet of the administrative opinion is, however, illusory. The majority conforms interpretation of the Phoenix Steel salaried employees' benefit plan to the Connor decision because the employer knew the meaning conferred on the plan in that case and it took no

Inc., 1975 Salaried Retirement Plan, 854 F.2d 1516, 1525-27 (3d Cir. 1988) (Amato is not consistent with Sutton line of cases).

STANDARD OF REVIEW

Having concluded that ERISA has not been per se violated by the adoption of rules that eliminated plaintiffs' eligibility for Rule-of-65 Retirement benefits, the Court must review the decision of the General Pension Board to deny benefits. The parties disagree on the standard of review to apply.

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steps to distance itself from that meaning when the plan was revised to satisfy ERISA. The majority opinion of the PBGC Appeals Board, at page 6, confines the decision to "the exceptional circumstances of the case" and the dissenting opinion wisely counsels that the decision "should not stand as precedent for other Rule-of-65 benefit eligibility determinations under the Phoenix Steel Plan, or in other pension plans with provisions similar to the Rule-of-65." The Court concurs in the dissent's recommendation concerning the weight to accord Glenn.

Plaintiffs assert review must be done de novo; defendants proposes use of the arbitrary and capricious standard. The resolution of this dispute lies in Firestone Tire & Rubber Co. v. Bruch, 109 S.Ct. 948 (1989), and its young progeny.

In Firestone, the Supreme Court established de novo judicial review of an ERISA benefits denial decision "unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan." Id. at 956. The gist of Eleventh Circuit cases interpreting Firestone urges the conclusion that express language of discretionary authority is necessary before the arbitrary and capricious standard applies. See Baker, ___ F.2d at ___, slip op. at 1435; Moon v. American Home Assur. Co., 888 F.2d 86, 88-89 (11th

Cir. 1989); Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37, 39 (11th Cir. 1989). Of course, the discretionary authority must be conferred in the relevant area of decisionmaking.

The Plan provides for the Plan Administrator, the Secretary of the General Pension Board, "[t]o grant such pensions as are provided under this Plan" and "[t]o make and enforce such rules and regulations . . . as the Plan Administrator shall deem necessary for the efficient administration of this Plan, and to decide such questions as may arise in connection with the operation of this Plan." Plan, ¶ 8.1. Moreover, the General Pension Board is empowered to make "final and binding" decisions "to the extent permitted under ERISA" when a difference arises between the Plan Administrator and a participant on "any

matter arising under this Plan, including the right to receive benefits or the amount of such benefits . . . ." Id.

Further, the Plan expressly confers discretion on the General Pension Board regarding the construction of the Rule-of-65 Retirement benefits in two respects. As quoted previously, the Board is vested with discretion to determine what constitutes "suitable long-term employment" through rules and regulations. Id., ¶ 2.7. In addition, the Board possesses specialized authority to define continuous service in the event of the sale of a division, as stated in paragraph 5.3(c):

> Service with another employer to which an Employing Company sells or transfers all or part of a . . . division . . . of such Employing Company may be credited as continuous service under this Plan in accordance with and for such purposes as may be set forth in rules and regulations adopted by the

> General Pension Board with respect to each such sale or transfer.

The Board adopted rules and regulations purporting to construe the relevant plan provisions in connection with the sale of the Buffalo Tank Division.

In light of the foregoing provisions, the Court concludes that the General Pension Board's decisions must be reviewed under the arbitrary and capricious standard. The discretion conferred on the Plan Administrator and the General Pension Board s broad and express. Cf. de Nobel v. Vitro Corp., 885 F.2d 1180, 1186-87 (4th Cir. 1989) (power to "determine all benefits and resolve all questions pertaining to administration, interpretation and application of the Plan provisions" invoked arbitrary and capricious standard of review). The power to promulgate

rules and regulations, stated both in broad and specific terms, is a strong expression of discretionary authority. See Boyd v. Trustees of United Mineworkers Health & Retirement Fund, 873 F.2d 57, 59 (4th Cir. 1989), cited with approval in Baker, ___ F.2d at ___, slip op. at 1436 n.5. The Court therefore conducts its review from the perspective of the arbitrary and capricious standard.

ARBITRARY AND CAPRICIOUS

The Court's task is to determine whether the General Pension Board has interpreted the Plan rationally and in good faith, using as guidance such factors as the uniformity of the Board's construction, the reasonableness of the Board's reading of the Plan, and the extent to which concern over the future financial health of the Plan may underlie the interpretation. See Guy, 877 F.2d at

39; Anderson v. Ciba-Geigy Corp., 759 F.2d 1518, 1522 (11th Cir.), cert. denied, 474 U.S. 995 (1985). Plaintiffs bear the burden to demonstrate that the Board's decisions were arbitrary and capricious. On defendants' motion for summary judgment, plaintiffs must demonstrate sufficient material facts in dispute that the Court could reasonably infer that plaintiffs would carry their burden at trial.

The General Pension Board in effect placed Buffalo Tank Division salaried employees under paragraph 2.07(b) of the Plan. The rules and regulations adopted August 26, 1986, treat participants who cannot elect a voluntary pension at the time of sale and who go to work for Buffalo Tank Corporation as employees who have not broken continuous service. For their

service at the successor corporation, they continue to receive continuous service credit under the Plan for purposes other than the calculation of the amount of their benefits.

The General Pension Board's handling of the continuous service issue is consistent with the terms of the sale between Bethlehem Steel and Buffalo Tank Corporation. Article 8, section 8.01(f) of the sale agreement directed Bethlehem Steel to take precisely the steps it took regarding the Plan. In addition, section 8.01(b) committed Buffalo Tank Corporation to carry over pay and benefits at rates "substantially the same" as those under Bethlehem Steel, section 8.01(e) allocated the liability for severance benefits between the parties to the sale, and section 8.01(d) apportioned the responsibility for paying

claims arising under Bethlehem Steel's benefit plans. In short, the sale agreement established parameters for the administration of the Plan in accordance with the professed object of accomplishing the sale as an ongoing business.

Focusing on this perspective, it becomes apparent that the General Pension Board did not act in an arbitrary and capricious manner when it drafted regulations that rendered plaintiffs ineligible for the Rule-of-65 Retirement benefits and then enforced those regulations against plaintiffs' claims. The Board acted in concert with the sales agreement negotiated for this particular division sale. Given the structure of the sale, it was not unreasonable for the General Pension Board to define the sale as something other than a permanent

shutdown of a division. Indeed, it would seem odd to treat this sale, with its promise of the continuation of operations at comparable rates of pay and benefits, as a "permanent shutdown" as that phrase is commonly understood. Cf. Sejam v. Warner-Lambert Co., 889 F.2d 1346, 1348-50 (4th Cir. 1989); Lakey v. Remington Arms Co., 874 F.2d 541, 544-45 (8th Cir. 1989); Young v. Standard Oil (Indiana), 849 F.2d 1039, 1045-48 (7th Cir. 1988); Accardi v. Control Data Corp., 836 F.2d 126, 128-29 (2d Cir. 1987); Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623, 626-27 (6th Cir. 1987); Jung v. FMC Corp., 755 F.2d 708, 712-15 (9th Cir. 1985).

This discussion highlights the appearance of a rational and good faith interpretation of the Plan. Plaintiffs do not posit any internal inconsistencies

in the construction of the Plan; rather, their primary bone of contention is a perceived inconsistency with other sales of assets by Bethlehem Steel. This alleged inconsistency the Court need not resolve. The Plan expressly directs the General Pension Board to promulgate rules and regulations concerning service continuity for each sale. Consequently, the Plan contemplates some degree of inconsistency among the treatment of employees from sale to sale. Plaintiffs can raise a reasonable inference that the alleged inconsistencies rise to the level of arbitrary and capricious only if they come forward with proof tending to show that the sales are sufficiently alike that different treatment is plainly unreasonable. This burden has not been

met.[5] See Adcock, 822 F.2d at 626. Indeed, two examples which plaintiffs urge the Court to consider, the Broyhill and Associates sale (documented by a letter dated October 12, 1987) and the Panther Valley sale (documented by a press release hearing a February 27, 1989 date), took place subsequent to the Buffalo Tank Division sale. The General Pension Board cannot be faulted for arbitrary and capricious action when the

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[5] The Court alternatively finds that the statement of admitted facts in the Pretrial Stipulation forecloses any genuine dispute over an issue of material fact concerning other asset sales. The parties stipulate that all of the sales arranged as sales of an ongoing business provided for compensation and benefit protections for employees and did not allow for Rule-of-65 benefits, while all of the sales arranged as sales of permanently shutdown assets, regardless of whether the operation actually shutdown, had no protections for pay and benefits and allowed for Rule-of-65 benefits. The distinction drawn between the two classes of sales easily passes scrutiny.

alleged inconsistency arose subsequent to the action which is under challenge.

The reasonableness of the General Pension Board's construction of the Plan should now seem apparent. The Board withheld severance benefits in circumstances where employees faced no real prospect of unemployment or reduced compensation and benefits as a result of the sale. Cf. Sly v. P.R. Mallory & Co., 712 F.2d 1209, 1211 (7th Cir. 1983) ("severance pay is generally intended to tide an employee over while seeing a new job"); Bowman v. Firestone Tire & Rubber Co., 724 F.Supp. 493, 501 (N.D. Ohio 1989) (payment of severance benefits in instances where successor corporation will likely continue to operate is designed as compensation for possibility of lower pay or benefits). Payment of Rule-of-65 benefits to plaintiffs would

be an obvious windfall; avoiding this result is a clearly reasonable object. See Agee v. Armour Foods Co., 672 F.Supp. 1210, 1219 (W.D. Mo. 1986), aff'd, 834 F.2d 144 (8th Cir. 1987). Plaintiffs were never misled to believe that they would receive Rule-of-65 benefits; their notice of the unavailability of the benefits weighs in favor of the Board's interpretation. See Anderson, 759 F.2d at 1522-23. Plaintiffs have not claimed, other than by implication through their inconsistency argument[6], that the Board

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[6] Plaintiffs employ a familiar literary reference to sum up their position concerning the Board's authority to define the treatment of severance benefits. The quotation from Lewis Carroll's Through the Looking Glass, "a frequently cited source of authority on and about the judicial process," Director, OWCP v. Mangifest, 826 F.2d 1318, 1334 (3d Cir. 1987) (Weis, J., concurring), which "Lewis Carroll would likely roll over in his grave," Claussen v. Aetna Casualty & Surety Co., 676 F. Supp. 1571, 1580 (S.D. Ga. 1987) (Edenfield, J.), were to examine many of

has engaged in an unreasonable

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the arguments for which it is employed, is incomplete. It reads, in full:

> "When I use a word,' Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean--neither more nor less."
>
> "The question is," said Alice, "whether you can make words mean different things."
>
> "The question is," said Humpty Dumpty, "which is to be master--that's all."

The point being, "Words are the servant of men, not their masters." Handschu v. Special Services Div., 605 F.Supp. 1384, 1409 (S.D.N.Y. 1985) (Haight, J.). The judicial role often is to take control of the words from persons who lack or misuse the authority to define the words. E.g., Langer Roofing & Sheet Metal, Inc. v. Secretary of Labor, 524 F.2d 1337, 1339 (7th Cir. 1975). In other cases, the Court should recognize that the power to define the meaning of the words has been committed to some other person or institution and defer accordingly. See, e.g., United States v. Kindrick, 576 F.2d 675, 677 & n.2 (5th Cir. 1978). This is a case in the latter category; the Court recognizes the authority of the Board to construe the indefinite terms of the Plan, confined only by the arbitrary and capricious standard.

interpretation.

Based on the foregoing, the Court concludes that the General Pension Board acted within its discretion when it established and enforced eligibility criteria for the Rule-of-65 Retirement benefits, as adapted for the sale of the Buffalo Tank Division.[7] Accordingly, it is

ORDERED AND ADJUDGED:

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[7] The parties stipulated to the reservation of jurisdiction by the Court for the purpose of determining attorney fees, if any, for the prevailing party. The parties are reminded that any motion regarding attorney fees is governed by Local Rule 4.18(a) and any memoranda concerning the issue should address the five factors identified by the Eleventh Circuit as guidelines to the award of attorney fees under ERISA, see Curry v. Contract Fabricators Inc. Profit Sharing Plan, 891 F.2d 842, 848-50 (11th Cir. 1990); Dixon v. Seafarers' Welfare Plan, 878 F.2d 1411, 1412-13 (11th Cir. 1989); McKnight v. Southern Life & Health Ins. Co., 758 F.2d 1566, 1572 (11th Cir. 1985).

1. That Defendants' Motion for Summary Judgment and/or Dismissal is hereby granted;

2. That the Clerk of the Court is hereby directed to enter judgment in favor of defendants and dismissing this case, with costs to be assessed according to law; and

3. That the Court retains jurisdiction for the purpose of determining attorney fees, if any, as stipulated by the parties.

DONE AND ORDERED in Chambers at Jacksonville, Florida, this 9th day of February 1990.

_____

UNITED STATES DISTRICT JUDGE

Copies to:

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 90-3167

MARGARET C. BLANK,
Plaintiff-Counterclaim
Defendant-Appellant,

DONALD E. ALFORD, et al.,
Plaintiffs-Counterclaim
Defendants,

versus

BETHLEHEM STEEL CORPORATION,
PENSION PLAN OF BETHLEHEM STEEL
CORPORATION AND SUBSIDIARY
COMPANIES,
Defendants-Counterclaim
Plaintiffs-Appellees.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING
(May 13, 1991)

BEFORE: CLARK, Circuit Judge, Hill* and COFFIN**, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by appellant, Margaret C. Blank, is denied.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Frank M. Coffin, Senior U.S. Circuit Judge, for the First Circuit, sitting by designation.

STATUTES

29 U.S.C. § 1132(a)(1)(2)(3).

Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought--

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;